Supreme Court, U. S.
FILED
JAN 24 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1511

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare, Petitioner

v.

EVELYN ELLIOTT, et al.

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare, Petitioner

v.

FANNIE BUFFINGTON, et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN SUPPORT OF RESPONDENTS

BRUCE K. MILLER
NEAL S. DUDOVITZ
GILL W. DEFORD
National Senior Citizens Law Center
1636 West Eighth Street
Los Angeles, CA 90017
(213) 388-1381

EDWARD C. KING
National Senior Citizens Law Center
1200 - 15th Street, N.W.
Washington, D.C. 20005
(202) 872-1404

Attorneys for Amicus Curiae The Gray Panthers

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1511

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare, Petitioner

v.

EVELYN ELLIOTT, et al.

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare, Petitioner

v.

FANNIE BUFFINGTON, et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN SUPPORT OF RESPONDENTS

BRUCE K. MILLER
NEAL S. DUDOVITZ
GILL W. DEFORD
National Senior Citizens Law Center
1636 West Eighth Street
Los Angeles, CA 90017
(213) 388-1381

EDWARD C. KING
National Senior Citizens Law Center
1200 - 15th Street, N.W.
Washington, D.C. 20005
(202) 872-1404

Attorneys for Amicus Curiae
The Gray Panthers

SUBJECT INDEX

	Page
Motion of Gray Panthers for Leave to File Brief Amicus Curiae.....	1
Brief Amicus Curiae of the Gray Panthers.....	6
Interest of the Amicus.....	6
Summary of Argument.....	6
Argument.....	10
I. The Private Interest of An Eligible Social Security Recipient In Uninterrupted Receipt of Benefits Is Substantial Enough to Warrant the Protection of A Pre-recoupment Oral Hearing.....	10
II. The Decision of the Court of Appeals to Grant Declaratory and Injunctive Relief to A Class of Similarly Situated Social Security Beneficiaries Was Well Within Its Authority...	23
A. The jurisdiction conferred by the Social Security Act, 42 U.S.C. § 405(g), neither precludes certification of a class authorized by Rule 23 of the Federal Rules of Civil Procedure nor limits the form of relief which may be granted by the federal courts.....	23

Argument - continued Page

B. The exercise of mandamus jurisdiction approved by the Court of Appeals is not precluded by section 205(h) of the Social Security Act, 42 U.S.C. § 405(h)..... 33

Conclusion..... 38

CITATIONS

Cases:

Califano v. Sanders, 430 U.S. 99 (1777)..... 4

Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978).....25, 29

Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977).....11, 24

Ferguson v. Califano, No. CV 75-2620 RF (C.D. Cal.)..... 18

Goldberg v. Kelly, 397 U.S. 254 (1970).....8, 11, 22, 23

Hecht Company v. Bowles, 321 U.S. 321 (1944)..... 30

Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975).....25, 26

Johnson v. Mathews, 539 F.2d 1111 (8th Cir. 1976)...25, 29, 30, 31

Jones v. Califano, 576 F.2d 12 (2d Cir. 1978).....25, 29, 33

Kendall v. United States, ex rel. Stokes 37 U.S. (12 Pet.) 524 (1838)..... 35

Cases - continued Page

Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977)..... 25

Mathews v. Eldridge, 424 U.S. 319 (1976).....4, 10, 14, 16, 28

McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813)..... 35

Pope v. Railroad Retirement Board and Thrash v. Railroad Retirement Board, Civil No. 77-2166 and 78-0313 (D.D.C.)..... 5

Shannon v. United States Civil Service Commission, 444 F.Supp. 354 (N.D.CAl. 1977), appeal pending No. 78-1933 (9th Cir.)...4, 5

Smith v. United States 330 F.2d 70 (10th Cir. 1964)..... 36

Terminal Freight Handling Company v. Solien, For and on Behalf of NLRB, 444 F.2d 699 (8th Cir. 1971), cert. denied 405 U.S. 996 (1972)..... 30

Weinberger v. Salfi, 422 U.S. 749 (1975)..... 24

Statutes and Rules:

Declaratory Judgment Act, 28 U.S.C. § 2201, 2202.....9, 30, 31

Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C. § 1132.....26, 27

Mandamus and Venue Act of 1962, P.L. 87-748 (October 5, 1962).... 36

Statutes and Rules - continued — Page

Social Security Act:
Title II, 42 U.S.C. § 401 et seq:
Section 203(b), 42 U.S.C. § 403(b)..... 11
Section 205(g), 42 U.S.C. § 405(g).....9, 23, 24, 25, 26, 29, 30, 31, 32, 33
Section 205(h), 42 U.S.C. § 405(h).....9, 33, 34, 35, 37
Title XVI, 42 U.S.C. § 1381 et seq.....7, 15, 16, 17, 18, 19, 20, 22
42 U.S.C. § 1382(a)(1)(A)..... 19
42 U.S.C. § 1382(a)(1)(B)..... 18
42 U.S.C. § 1382a..... 19
42 U.S.C. § 1383(a)(4)(A)..... 17

49 Stat. 624..... 34

28 U.S.C. Section 41.....34, 35, 37

28 U.S.C. § 1331(b)..... 27

28 U.S.C. § 1343..... 26

28 U.S.C. § 1361.....24, 27, 36, 37

Federal Rules of Civil Procedure, Rule 23.....9, 26, 28

Supreme Court Rule 42(1)..... 1

Miscellaneous:

BALL, SOCIAL SECURITY TODAY AND TOMORROW, Columbia University Press (1978).....6, 7, 12, 13, 19, 22

FRIENDLY, FEDERAL ADMINISTRATIVE AGENCIES (1962)..... 33

3B MOORE'S FEDERAL PRACTICE ¶ 23.02 III..... 28

Miscellaneous - continued — Page

U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE/ SOCIAL SECURITY ADMINISTRATION, OFFICE OF RESEARCH AND STATISTICS, PUBLIC ASSISTANCE STATISTICS, JUNE 1978 (October 1978).....21, 22

U.S. SENATE SUBCOMMITTEE ON FINANCE, STAFF DATA AND MATERIALS ON PUBLIC WELFARE PROGRAMS (APRIL 1978)..... 20

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1511

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare, Petitioner

v.

EVELYN ELLIOTT, et al.

JOSEPH A. CALIFANO, Secretary of Health, Education, and Welfare, Petitioner

v.

FANNIE BUFFINGTON, et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN SUPPORT OF RESPONDENTS

MOTION OF GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Gray Panthers respectfully move this court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief in this matter as amicus

curiae in support of the respondents. In support of this motion, the Gray Panthers submit the following statement outlining their interests in the issues presented by these consolidated cases:

1. Respondents have consented to the Gray Panthers request to submit a brief amicus curiae in support of their position. By letter to Peter Buscemi, Assistant to the Solicitor General, dated January 11, 1979, the Gray Panthers have requested the consent of the petitioner, the Secretary of Health, Education, and Welfare, to the filing of their brief. To date, the Gray Panthers have received no response to that letter. Should the Secretary grant his permission to the filing of their brief, the Gray Panthers will promptly notify the court.

2. The Gray Panthers are a national organization of old and young persons who seek to reform and improve various institutions and laws that affect the lives of senior citizens throughout the United States. Since their establishment nearly a decade ago, a major concern of the Gray Panthers has been to protect the rights

under the Constitution and laws of the United States of people who depend on monthly Social Security benefits for the necessities of life. A large proportion of the membership of the Gray Panthers consists of Social Security recipients, many of whom enjoy little or no income beyond their Social Security benefits. For this reason, the Gray Panthers have consistently espoused the rights of Social Security beneficiaries before the Congress, before the Social Security Administration, and, where appropriate, before the federal courts.

3. The Gray Panthers submit that their views may be especially useful to the court in resolving the issues presented by this appeal. One of the factors likely to be assessed by the court in determining whether an opportunity for an oral hearing must precede the Social Security Administration's recoupment of previous overpayments from a recipient's current benefits is the weight of the interest of an innocent and dependent recipient in the uninterrupted receipt of his or her benefits.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The large number of Social Security recipients included among their members enables the Gray Panthers to offer a firsthand, practical evaluation of this interest.

4. The perspectives of the Gray Panthers on the matters presented by this litigation are augmented by the experience of their counsel, staff attorneys at the National Senior Citizens Law Center, with the jurisdictional and remedial questions raised by the Secretary's petition for writ of certiorari. A substantial portion of the practice of the National Senior Citizens Law Center is devoted to the representation of Social Security claimants and recipients. National Senior Citizens Law Center attorneys have recently appeared before this court in Califano v. Sanders, 430 U.S. 99 (1977). In addition, National Senior Citizens Law Center attorneys are counsel of record for plaintiffs in two cases cited by the Secretary as similar to the present one, both of which are currently pending in the lower federal courts. Shannon v.

United States Civil Service Commission, 444 F.Supp. 354 (N.D.Cal. 1977), appeal pending No. 78-1933 (9th Cir.); Pope v. Railroad Retirement Board, and Thrash v. Railroad Retirement Board, Civil Nos. 77-2166 and 78-0313 (D.D.C.) (brief for petitioner at 51-52). The Gray Panthers' counsel are therefore conversant with the issues presented by the Secretary's petition in this case.

WHEREFORE, the Gray Panthers respectfull move that the court grant them leave to file the brief amicus curiae which accompanies this motion.

Respectfully submitted,

BRUCE K. MILLER
NEAL S. DUDOVITZ
GILL W. DEFORD
EDWARD C. KING

By Bruce K. Miller

Attorneys for Amicus Curiae
Gray Panthers

BRIEF AMICUS CURIAE OF THE GRAY PANTHERS

Interest of the Amicus

A statement describing the Gray Panthers and their interest in this case is set forth in the preceding motion requesting leave to file this amicus curiae brief.

Summary of Argument

Amicus curiae Gray Panthers offer argument on only two of the issues presented for review by the Secretary's petition for writ of certiorari. First, amicus contends that the interest of a recipient of Social Security benefits in uninterrupted receipt of those benefits, pending the outcome of an oral hearing of his claim for waiver of previous overpayments, is extremely substantial. According to former Social Security Commissioner, Robert M. Ball, Social Security is "the most important single source of income for the great majority of the more than 33 million beneficiaries, and it is responsible for keeping some 12 to 13 million Americans above the government defined poverty level". BALL, SOCIAL SECURITY TODAY AND TOMORROW, Columbia

University Press, 1978, at 14,15. For nearly 40 percent of Social Security recipients, then, uninterrupted receipt of monthly benefits is the only barrier between modest comfort and severe deprivation.

If this barrier is removed, neither the federal Supplemental Security Income program nor state and local plans for general assistance are likely to provide an adequate substitute. Supplemental Security Income benefits become available only after long delays in the processing of applications and are even then extremely meager. In 1978, the federally guaranteed SSI floor ($177.80 per month for an eligible individual) still fell below the 1976 official poverty standard. This federal minimum was supplemented by only 24 of the states, including the District of Columbia.

Local general relief programs are even less likely to provide an adequate substitute for the monthly income lost during a suspension of Social Security benefits. In the 42 states reporting general assistance data to the Social Security Administration for the month of June, 1978, the

average monthly benefit per recipient was about $127. In no state do general assistance payments provide nearly enough to meet basic living expenses as defined by the 1976 federal poverty standards. The federal and state welfare benefits, which the Secretary suggests will be available to alleviate the needs of Social Security recipients while their benefits are suspended, are in fact not so readily forthcoming as he supposes, nor are they the complete defense against abject poverty which he portrays them to be. The "brutal need" from which public assistance recipients were shielded by this court's decision in Goldberg v. Kelly, 397 U.S. 254, 261 (1970), may well be the lot of many recipients of Social Security benefits if a similar shield is not also erected here.

Amicus' second contention is that the class wide, declaratory and injunctive relief awarded by the courts below is fully authorized by the remedial powers granted by Congress to the federal judiciary. Amicus contends that the relief granted by the lower courts flows most

directly from the power conferred by section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), to "affirm, reverse, or modify" decisions of the Secretary denying Social Security benefits as augmented by the Declaratory Judgment Act, 22 U.S.C. §§ 2201, 2202, and Rule 23 of the Federal Rules of Civil Procedure. Alternatively, however, amicus also submits that the lower court's analysis of the scope of its historical power to issue appropriate writs of mandamus to federal officers was correct and that nothing in section 205(h) of the Social Security Act, 42 U.S.C. § 405(h), was designed to alter or limit that power.

ARGUMENT

I.

The Private Interest of An Eligible Social Security Recipient In Uninterrupted Receipt of Benefits Is Substantial Enough to Warrant the Protection of A Pre-recoupment Oral Hearing.

In its decision in Mathews v. Eldridge, 424 U.S. 319 (1976), this court found that one of the three elements to be weighed in determining the specific dictates of due process in a particular situation is "the private interest that will be affected by ... official action". 424 U.S. at 336. Elaborating on this standard, the court went on to point out that "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decision-making process". Id. at 341. When the situation of Social Security beneficiaries facing reduction of their monthly benefits in order to recoup previous overpayments is measured against this test, the potential harms which emerge are substantial indeed. For many recipients, an interruption in the continuous receipt of monthly Social Security

benefits may threaten the ability to provide for the necessities of life.

All parties, as well as the courts below, have conceded that basic eligibility for all three types of Social Security benefits, retirement, survivors, and disability, does not depend directly on a claimant's ability to prove financial need.[1/] But the absence of proof of financial need as a condition of eligibility for Social Security benefits by itself reveals very little about the economic plight of Social Security recipients, or the degree to which their monthly benefits provide the only secure

---

1/ The Court of Appeals did point out, however, that the so-called Social Security "retirement test" does place strict limits on the amount of earned income a recipient of Social Security retirement or survivor's benefits may accrue and still retain eligibility under the program. To this extent, the court pointed out, Social Security benefits are need related and thus similar to the public assistance payments at issue in Goldberg v. Kelly, 397 U.S. 254 (1970); Elliott v. Weinberger, 564 F.2d 1219, 1231, n. 16 (9th Cir. 1977); see also section 203(b) of the Social Security Act, 42 U.S.C. § 403(b).

barrier against abject poverty.

Robert M. Ball, Social Security Commissioner under Presidents Kennedy, Johnson, and Nixon, last year completed an authoritative and comprehensive study of the Social Security program. BALL, SOCIAL SECURITY TODAY AND TOMORROW, Columbia University Press, 1978. Mr. Ball's book gives special emphasis to the economic plight of the elderly and to the role of Social Security payments in alleviating poverty among retired and disabled Americans. Perhaps the most significant finding set forth in Commissioner Ball's book is that "poverty or near poverty is all too often still the lot of a significant proportion of the elderly". BALL, supra, at 88. Even after Social Security benefits, more than 20% of the nation's 16 million elderly families in 1976 had total incomes below the official poverty level of $2730 per year for a single person living alone and $3440 for an elderly couple. An even more revealing finding is that without Social Security benefits a large majority of elderly families

would be officially defined as poor. If the incomes of old people were limited to what they had saved, could receive as annuities from employment related pension plans, or could earn by continuing to work after retirement age, 60% of them in 1976 would have been officially defined as poor. Thus, for nearly 40% (or more than six million) elderly families, Social Security benefits represent the difference between a modestly comfortable living standard in retirement and extreme poverty. BALL, at 89-90. Commissioner Ball does not exaggerate the importance of Social Security benefits in preventing poverty when he concludes that "Social Security is the key to the economic well-being of the great majority of retired elderly people". BALL, supra, at 90.

Given Commissioner Ball's portrait of the economic situation of the aged, the fact that Social Security payments are not triggered by the direct application of a means test does not provide reliable indication of the "degree of potential deprivation that may be created" by an interruption in a recipient's right to

receive his monthly benefit check. Mathews v. Eldridge, supra, 424 U.S. at 341. For many Social Security recipients, that check quite literally provides the means to purchase the necessities of life.[2/]

The Secretary does not dispute the important role played by Social Security

---

2/ The Secretary now apparently acknowledges the severe hardships which often result from a suspension of Social Security benefits. The new Claims Manual provisions, unveiled for the first time in his Brief for the Petitioner, would limit, for at least some recipients, the amount of monthly benefits subject to suspension in order to recover overpayments to 25% of the recipient's normal monthly check. For June of 1978, the average monthly Social Security benefit paid was about $260 (Social Security Bulletin, October, 1978). But for a recipient whose income exceeds the official poverty level only because of his entitlement to Social Security benefits, a loss of even $65 per month (25% of $260) can be devastating indeed. In any event, the Secretary's new 25% limit apparently applies only in the case of a recipient who agrees to forego his statutory right to request waiver of recovery of the overpayment (Brief for the Petitioner, at 32). Thus, members of the class represented by respondents will continue to be subject to a complete suspension of benefits if deemed appropriate by the Secretary.

benefits in relieving poverty among recipients. Rather, he suggests that a reduction in benefits will not often cause severe deprivation because of the supposedly easy availability of adequate substitute benefits from either the federal Supplemental Security Income (SSI) program or from state and local general assistance plans. (Brief for the Petitioner, at 33-36.) With deference to the Secretary, amicus submits that he has seriously overestimated both the accessibility and sufficiency of the benefits provided from these alternative sources of subsistence income.

If, as the Secretary suggests, a suspension of Social Security benefits in order to recover previous overpayments is generally brief and temporary, then it is equally true that the income lost because of such a suspension can be replaced, if at all, only by a program capable of responding quickly to emergency needs. The operation of the SSI program is, unfortunately, not characterized by this sort of flexibility. The SSI program is, of course, operated by the Social Security Administration.

Perhaps not surprisingly, the Administrative review process by which claims for SSI benefits are evaluated has not escaped the "torpidity" found by this court to pervade the determination of Social Security disability appeals. Mathews v. Eldridge, supra, 424 U.S. at 342. Among new applications for SSI benefits based on age filed in the month of September, 1977, the average processing time between application and initial determination of eligibility was 33 days. In the case of new applications based on blindness or disability, the average September, 1977 processing time was 59 days.[3/] For a Social Security recipient whose chief or sole source of income had been the monthly benefits suspended in order to recover a prior overpayment, a

---

3/ These average processing periods do not reflect the time necessary actually to place an initial check for monthly SSI benefits into the mail to a new applicant, as they do not include the period following an initial determination of eligibility during which that determination is certified to the United State Treasury Department which then prepares and mails the initial benefit check.

five to nine week period without any income whatever will nearly always present a substantial hardship and will, in many cases, be devastating.[4/]

The average processing times for SSI claims provide only an incomplete picture of the deprivations which result from the slow pace of the SSI application process. Thus, even though the average processing time for an SSI claim based on age filed in September, 1977 was 33 days, fully 38% of these claims were not processed within the first 30 days following their filing date and 22% were still pending after 45 days. For claims based on blindness and disability, the picture again was correspondingly worse: 40% of the claims filed in September of 1977 were still pending after 60 days, and 17% had still not been determined after 90 days. In light of these statistics, it is fair to say that for many Social Security

---

4/ The only relief available to an SSI applicant awaiting deposition of his claim is a single non-renewable emergency advance payment of $100, less than one-half the monthly income by which poverty was officially defined in 1976. 42 USC 1383(a)(4)(A).

recipients suffering a suspension of benefits because of a previous overpayment, the availability of SSI benefits as a prompt and adequate substitute is largely theoretical. Even if, as the Secretary argues, elderly and disabled Social Security recipients generally are eligible for SSI benefits, this eligibility will often be translated into dollars usable for food and shelter only after the Secretary's suspension of Social Security benefits has worked its harm.[5/]

Even those recipients whose SSI benefits do not come too late will often find that they amount to too little to pay the

---

5/ In fact, many elderly and disabled Social Security recipients are not eligible for SSI benefits no matter how great their short-term financial needs may be. Throughout the period during which this lawsuit has been pending, SSI eligibility was restricted to persons whose net worth, aside from a home and certain other excluded resources, was less than $1500. 42 U.S.C. § 1382(a)(1)(B), § 1382(b)b. The foregoing statistics on processing times for SSI applications are drawn from the trial memorandum filed by the Secretary on January 10, 1978 in Ferguson v. Califano, No. CV 75-2620-RF (C.D.Cal.).

ordinary living expenses formerly met by Social Security. During 1978, the maximum federal SSI payment to an eligible individual was $177.80 per month, a level slightly below the official poverty standard set two years before in 1976. 42 U.S.C. § 1382(a)(1)(A). This maximum was payable only to an applicant with virtually no other income. 42 U.S.C. § 1382a. This federal maximum was supplemented by only 24 of the 50 states and the District of Columbia. Most of these state supplements brought the total maximum SSI payment to only slightly more than $200 per month for an eligible individual.[6/] It

---

6/ The highest combined federal, state SSI benefit (excluding Alaska) was $296 per month, paid in Massachusetts, an amount barely 25% above the poverty line. Former Social Security Commissioner Ball has described the situation of an elderly person living at this income level as "near poor" and, therefore, as presenting "great difficulty in making ends meet." According to Mr. Ball, the "inadequate income" received by such a recipient "is still the number one problem, bringing with it a host of other problems: inadequate housing, inadequate opportunity for participation in community activities and recreation, and inadequate health care." BALL, SOCIAL SECURITY TODAY AND TOMORROW, supra, at 89.

is fair to say then that of those Social Security recipients suffering benefit suspensions who are able to receive SSI benefits in time to help remedy their loss, the level of benefits payable will very rarely avert the deprivations which accompany a subpoverty level income. (The foregoing data on federal and state SSI benefits payable in 1978 is drawn from U.S. Senate Committee on Finance, Subcommittee on Public Assistance, Staff Data and Materials on Public Welfare Programs (April, 1978.)

The Secretary's reliance on state and local programs of general assistance to fill the income void created by a suspension of Social Security benefits is, if anything, less justified than his confidence in the SSI program. To begin with, eligibility requirements for general assistance benefits vary greatly from state to state and locality to locality. There is no assurance that a Social Security recipient whose benefits have been suspended will be able to qualify for the general relief made available in the political jurisdiction where he resides. More important, in no state

do the benefits provided by general assistance programs approach a level sufficient to provide for basic living expenses. Within the 42 states and territories reporting data on their general assistance programs to the Social Security Administration for the month of June, 1978, the average monthly benefit per recipient amounted to only about $127, barely more than 50% of the 1976 official poverty standard. General assistance benefits ranged from a low of $9.40 per month (West Virginia) to a high of $154.55 per month (District of Columbia). In only 13 jurisdictions did the annual value of general assistance payments, plus the bonus value of food stamps, exceed $2,000. General assistance programs, in short, do not even purport to cover basic living costs and can in no way be expected to meet the current food and shelter expenses of a Social Security recipient whose benefits have been suspended. (The foregoing data concerning general assistance programs is drawn from U.S. Department of HEW/Social Security Administration, Office of Research and

Statistics, Public Assistance Statistics, June, 1978 (October, 1978).

The plight of a Social Security recipient whose monthly benefits are significantly reduced or suspended in order to recoup a previous overpayment is, thus, far closer to that of the welfare recipient protected by this court's decision in Goldberg v. Kelly, supra, than is acknowledged by the Secretary. Former Commissioner Ball's analysis shows that despite the absence of means tested eligibility the Social Security program is designed chiefly to redress and prevent poverty among the nation's aged and disabled citizens. The inadequacy of alternate benefits from either the Supplemental Security Income program or state and local general relief programs (and in the case of SSI, the inability of the Social Security Administration to respond promptly to emergency needs) means that a loss of Social Security benefits will often leave a recipient with no adequate means to provide for the necessities of life. The severe deprivation which this court took pains to prevent by its decision in

Goldberg will plainly be the lot of many of the aged and disabled poor should the court now fail to affirm the holding of the Court of Appeals. The interests of recipients in uninterrupted receipt of Social Security benefits pending an oral hearing on their claims of entitlement to waiver of recovery of prior overpayments is substantial indeed. The strength of this interest points strongly toward a requirement that such a hearing be afforded as a matter of due process before any suspension of benefits is undertaken.

II.

The Decision of the Court of Appeals to Grant Declaratory and Injunctive Relief to A Class of Similarly Situated Social Security Beneficiaries Was Well Within Its Authority.

A. The jurisdiction conferred by the Social Security Act, 42 U.S.C. § 405(g), neither precludes certification of a class authorized by Rule 23 of the Federal Rules of Civil Procedure nor limits the form of relief which may be granted by the federal courts.

The decision of the Court of Appeals to affirm the district courts' class certification orders and awards of declaratory and injunctive relief on behalf of class

members relied quite specifically on the appeals court's holding that jurisdiction over respondents' suits could properly be maintained under the mandamus power of the federal courts. 28 U.S.C. § 1361; Elliott v. Weinberger, supra, 564 F.2d 1219, 1225 n. 8a. While amicus Gray Panthers concur fully with the Court of Appeals' analysis of the mandamus power, amicus also submits that the court need not have undertaken its exhaustive analysis of the history and scope of federal mandamus jurisdiction, for the grants of class certification and injunctive relief made by the district courts and approved by the Court of Appeals were fully authorized by, and consistent with, the basic jurisdictional grant contained in the Social Security Act itself. 42 U.S.C. § 405(g).

Purporting to rely on this court's decision in Weinberger v. Salfi, 422 U.S. 749 (1975), the Secretary contends that the authorization of judicial review over Social Security appeals contained in section 405(g) "manifests a congressional intent to bar class actions" (Brief for the Petitioner, at 66). The Secretary's

argument is apparently based on the fact that section 405(g) authorizes "any individual" to sue in federal district court in order to obtain judicial relief from an adverse decision on that individual's claim.[7/] The Secretary concedes that the federal courts of appeal which have considered his argument have been virtually unanimous in rejecting it. Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Jones v. Califano, 576 F.2d 12 (2d Cir. 1978); Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3rd Cir. 1977); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975); Johnson v. Mathews, 539 F.2d 1111 (8th Cir. 1976). The Secretary would, nevertheless, urge this court to reject all of these decisions on the

---

7/ 42 U.S.C. § 405(g) provides, in pertinent part, as follows:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within 60 days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

ground that they "accord insufficient respect to the relevant statutory language". (Brief for the Petitioner", at 68.)

Amicus submits that the opinion of Mr. Justice (then judge) Stevens in Jimenez v. Weinberger, supra, an opinion which devotes considerable attention to the "relevant statutory language", persuasively disposes of the Secretary's argument. To Mr. Justice Stevens' analysis, amicus would add only that the Secretary's attempt to turn the appearance of the phrase "any individual" in section 405(g) into a prohibition against class actions is inconsistent with the purposes of Rule 23, with the language of federal jurisdiction statutes generally, and with common sense. To begin with, virtually all jurisdictional statutes are cast in individual terms. The civil rights statute, 28 U.S.C. § 1343, for example, provides that "the district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person". The recently enacted Employee Retirement Income Security Act of 1974

(ERISA), which authorizes judicial review of claims denied by private pension plans, states that a civil action may be brought "by a participant or beneficiary" of such a plan. 29 U.S.C. § 1132(a). Even the federal question jurisdiction statute, 28 U.S.C. § 1331, speaks in terms of the individual "plaintiff" in providing that costs may be assessed against a successful litigant whose claim is ultimately found to be worth less than $10,000. 28 U.S.C. § 1331(b). And finally, the mandamus statute, 28 U.S.C. § 1361, a jurisdictional grant which is admitted by the Secretary to authorize class wide relief in situations where it is applicable, authorizes the federal courts "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff".

No one has seriously suggested that the use of the singular form of "plaintiff", "participant", or "person" in these statutes evinces a congressional design to preclude federal courts assuming jurisdiction over suits brought under their authority from entertaining an

otherwise appropriate motion for class certification. That such an argument has not heretofore been advanced is not surprising, for the major consequence of its acceptance would be a de facto repeal of Rule 23 of the Federal Rules of Civil Procedure. The major purpose of Rule 23 is, of course, to permit a single adjudication to dispose of what otherwise would be a multitude of individual claims. 3B MOORE'S FEDERAL PRACTICE, ¶ 23.02[1]. The logic of the Secretary's position would undermine the attainment of this purpose in nearly all the categories of federal litigation for which Rule 23 was designed. The Secretary's argument, in short, proves far too much. Congress' decision to allow "any individual" to secure judicial review of an adverse decision concerning his Social Security benefit rights does not bar a class action which is otherwise proper under Rule 23 and consistent with the administrative exhaustion requirements outlined by this court's opinion in Mathews v. Eldridge, supra.

The Secretary's contention that injunctive relief is also precluded by section

405(g) is structured along similar lines to his suggestion that a Social Security Act class action is, per se, improper. The Secretary's reasoning proceeds from the power granted to a federal district court by section 405(g) "to enter ... a judgment affirming, modifying, or reversing the decision of the Secretary". The Secretary finds the absence in this grant of authority of any reference to declaratory or injunctive relief to be "restrictive" in nature and to suggest that the general equitable powers of the federal courts simply "do not pertain to claims and remedies under Title II of the [Social Security] Act". (Brief for the Petitioner at 72.)

Once again, the Secretary's position has been rejected by those courts of appeal which have considered it. See particularly, Johnson v. Mathews, supra, 539 F.2d at 1125, 1126; Caswell v. Califano, supra, 583 F.2d at 14, n. 12; Jones v. Califano, supra, 576 F.2d at 14. And, once again, the logic of the Secretary's argument is overbroad. Federal jurisdictional statutes frequently do not

directly specify that relief may be awarded in the form of a declaratory judgment or an injunction. But such specification is in no way a prerequisite to such an award, since the authority of a federal court to issue such relief grows out of its power to exercise the "traditional practices of an equity court", Hecht Company v. Bowles, 321 U.S. 321 (1944); Johnson v. Mathews, supra, 539 F.2d at 1125. Nothing in section 405(g) demonstrates any intention to limit the federal court's traditional equitable powers.

The authority of a federal court sitting in equity to issue appropriate declaratory and, where necessary, injunctive relief has, moreover, been codified by the Declaratory Judgment Act, 22 U.S.C. § 2201, 2202. While not a jurisdictional statute, the remedial powers conferred by the Declaratory Judgment Act are plainly applicable whenever jurisdiction is otherwise appropriate. Terminal Freight Handling Company v. Solien, For and On Behalf of NLRB, 444 F.2d 699 (8th Cir. 1971), cert. denied 405 U.S. 996 (1972).

If, as the Secretary suggests, these powers could be exercised only when the authorizing jurisdictional statute contained some reference to "equitable" relief (Brief for the Petitioner, at 72-73), the impact of the Declaratory Judgment Act and its attendant grant of power to issue appropriate injunctive decrees would be largely redundant and its enactment hardly necessary.

Congress plainly has the authority to limit the equitable powers and discretion of the federal courts. Johnson v. Mathews, supra, 539 F.2d at 1125. However, unless every jurisdictional statute which does not specifically refer to these powers is to be construed as precluding their exercise, section 405(g)'s grant of authority to affirm, reverse, or modify a decision of the Secretary should not be construed as imposing such a limitation. The Secretary's contrary argument again proves far too much.[8/]

8/ It may be significant that in the present case, the declaratory and injunctive relief allowed by the Court of
(This footnote is continued on next page.)

Appeals is, as a practical matter, far less drastic than the form of relief entailed by a slavishly literal adherence to the "affirm, reverse, or modify" language of section 405(g). The injunctions entered by the district courts operate with prospective effect only and do nothing more than force the Secretary to adjust his future recoupment policies to the requirements of the Constitution. But under the Secretary's interpretation of section 405(g), the appropriate relief would apparently have been to "reverse" all overpayment recoupment decisions made by the Secretary with respect to class members, thereby entailing the return of all monies collected through the reduction and suspension of benefits during the recoupment period.

It should be noted that the inherently prospective outlook of an injunctive decree is consistent with certification of a class whose members have met the exhaustion requirements of section 405(g). Social Security recipients who have not yet been threatened with a suspension of benefits in order to effect recovery of prior overpayments do not presently have ripe claims against the Secretary and, thus, do not have independent standing to bring suit. The value of the injunctive decree, affirmed here by the Court of Appeals, is that it permits the Court's judgment on the merits to become automatically applicable to future targets of recoupment without need for a new lawsuit. This result vindicates the "basic human claim that the law should provide like treatment under like circumstances".
(This footnote is continued on next page.)

B. The exercise of mandamus jurisdiction approved by the Court of Appeals is not precluded by section 205(h) of the Social Security Act, 42 U.S.C. § 405(h).

This court must address the question whether the lower court's assumption of mandamus jurisdiction in this case was permissible only if the relief awarded by the district courts and affirmed by the Court of Appeals is not, contrary to amicus' argument above, contemplated by the jurisdictional provision of the Social Security Act, 42 U.S.C. § 405(g). But if the mandamus jurisdiction issue is reached by this court, amicus submits that it was resolved correctly by the Court of Appeals.

In urging reversal of the Court of Appeals' approval of the exercise of mandamus jurisdiction, the Secretary does argue, albeit without much enthusiasm, that respondents' cases did not present claims appropriate "for the exercise of

---

Jones v. Califano, supra, 576 F.2d at 20. Quoting FRIENDLY, FEDERAL ADMINISTRATIVE AGENCIES 19 (1962), "we know that in a unitary court system, it is not stare decisis alone that binds the structure but also a recognition that like treatment is the touchstone", id.

mandamus jurisdiction". (Brief for the Petitioner, at 63-64.) But the core of the Secretary's argument against the lower court's reliance on the mandamus power is his contention that section 205(h) of the Social Security Act completely precludes mandamus jurisdiction in all suits arising in the context of the Social Security program. With due respect to the Secretary, amicus contends that this contention can be made only by ignoring the history of the federal courts' mandamus jurisdiction, especially as that history relates to the enactment of section 205(h), 42 U.S.C. § 405(h).

Statute 42 U.S.C. § 405(h) provides, in relevant part, that:

> "No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or government agency except as herein provided. No action against the United States, the Secretary, or any officer, or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

At the time the foregoing language was enacted in 1935, 49 Stat. 624, section 41 of Title 28 of the United States Code comprised most grants of subject matter

jurisdiction to the federal courts. It did not, however, include mandamus jurisdiction which at that time was grounded entirely in the common law of the District of Columbia. Mandamus had been available in the courts of the District of Columbia as a non-statutory remedy to compel performance of duties owed by federal officials since the establishment of the District as the nation's capitol. See McIntyre v. Wood, 11 U.S. (7 Cranch) 504 (1813); Kendall v. United States, ex. rel. Stokes, 37 U.S. (12 Pet.) 524 (1838). Since the prohibitions contained in section 405(h) contained, at the time they were enacted, absolutely no reference to common law mandamus jurisdiction, there is no basis for the Secretary's inference that section 405(h) was intended to restrict the ability of persons owed duties by federal officials to enforce them in the courts of the District of Columbia.

In 1948, section 41 of Title 28 was recodified, and its jurisdictional grants restated. Mandamus jurisdiction, however, continued to be grounded exclusively in the common law and to be

available only in the United States District Court for the District of Columbia.

In 1962, Congress acted to end the historical anomaly which required any person, no matter where he lived, to bring a claim in the nature of mandamus in the District of Columbia. The Mandamus and Venue Act of 1962, Pub. L. No. 87-748 (October 5, 1962), was enacted to provide "a remedy by which ... jurisdiction [over federal officers and employees formerly exercised in the District of Columbia courts] could be exercised throughout the country". Smith v. United States, 330 F.2d 70, 72 (10th Cir. 1964). This expansion of the venue for proceedings in the nature of mandamus was in no way designed either to expand or constrict the substantive breadth of the jurisdictional grant. The accompanying codification of common law mandamus jurisdiction at its present location, 28 U.S.C. § 1361, in no way changed the relationship of the mandamus power to other grants of subject matter jurisdiction in existence at the time of such codification.

The foregoing history provides no support for the Secretary's contention that the current appearance of the federal courts' mandamus power in the portion of the United States Code that succeeds section 41 of Title 28 means that the mandamus power was abrogated by the enactment of section 405(h). If section 405(h) did not affect common law mandamus jurisdiction at the time it was enacted, which it plainly did not, it cannot not be said to undermine an identical substantive grant of jurisdiction merely because the expansion of the venue within which that grant could be exercised required that it be codified within Title 28.

In sum, if, as the Court of Appeals properly found, the district courts' jurisdiction over respondents' claims was properly founded on 28 U.S.C. § 1361, that jurisdiction was not ousted by section 405(h). Should this court find it necessary to review the decision of the Court of Appeals upholding the exercise of mandamus jurisdiction, amicus respectfully submits that that decision ought properly to be affirmed.

CONCLUSION

For the reasons outlined in this brief, as well as those suggested in the brief submitted by respondents, amicus urges affirmance of the decision of the Court of Appeals in all respects.

Respectfully submitted,

BRUCE K. MILLER
NEAL S. DUDOVITZ
GILL W. DEFORD
EDWARD C. KING
NATIONAL SENIOR CITIZENS LAW CENTER

By Bruce K. Miller

Attorneys for Amicus Curiae
Gray Panthers